

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

**Implementation of the Satellite Home
Viewer Improvement Act of 1999**

Broadcast Signal Carriage Issues

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CS Docket No. 00-96

To: The Commission

**COMMENTS OF NATIONAL ASSOCIATION OF BROADCASTERS
AND ASSOCIATION OF LOCAL TELEVISION STATIONS**

On January 8, 2001, the Cable Services Bureau sought Comments on the Emergency Petition filed by the National Association of Broadcasters^{1/} and the Association of Local Television Stations ("ALTV")^{2/} on January 4, 2002, in which NAB and ALTV asked the Commission to block EchoStar's scheme of requiring subscribers to install a second dish to receive certain local television stations. For the reasons set forth in their Petition, NAB and ALTV urge the Commission to confirm promptly that, as the Commission always intended, satellite carriers may not "require subscribers to use two separate dishes to receive the full package of local channels." Order on Reconsideration, *In Re Implementation of the Satellite*

^{1/} NAB is a nonprofit incorporated association that serves and represents America's radio and television broadcast stations and networks. NAB and ALTV hereby incorporate their Emergency Petition, and the attachments to the Petition, by reference.

^{2/} ALTV is a non-profit, incorporated association of local television stations that are not affiliated with the ABC, CBS, or NBC television networks.

Home Viewer Implementation Act of 1999 -- Broadcast Signal Carriage Issues, CS Docket No. 00-96, ¶ 41 (released Sept. 5, 2001). Indeed, as NAB and ALTV have explained in detail, any scheme that forces consumers to undertake the burden of acquiring additional equipment to receive some -- but not all -- local stations is inherently and inevitably discriminatory.

Because NAB and ALTV have already filed an extensive discussion of the pertinent factual and legal issues in their Emergency Petition, these Comments are limited to four additional points. NAB and ALTV will address in their Reply Comments any issues raised by other parties.

1. Appropriateness of declaratory ruling. In its January 4 Notice, the Cable Services Bureau sought comment about whether "the issues raised are appropriate for resolution by declaratory ruling or other means of clarification, rather than by rulemaking proceeding to consider amendment of the rules. " Notice at 2. NAB and ALTV submit that the Commission has ample authority to proceed by way of declaratory ruling or other method of clarification. As NAB and ALTV set forth in their Petition, the Commission's intent in adopting the SHVIA regulations at issue here is absolutely clear: satellite carriers may not relegate some, but not all, local stations to a satellite that can be accessed only by subscribers who acquire additional equipment. EchoStar could not possibly claim to be unfairly surprised by such a clarification, when it was at all times on notice of the Commission's views on the matter.

The Commission should clarify that, as its original Order and Order on Reconsideration explained, the language of Section 76.66(i)(4) of its Rules was designed to *permit* a satellite carrier, if it so chose, to offer *all* local channels in a manner that would require customers to acquire additional equipment at their own expense. NAB/ALTV Petition at 5-6 (quoting Orders). For example, the Rule would permit EchoStar or DirecTV to require subscribers in

Baltimore to acquire a second dish (at their own expense) if they wished to obtain access to *any* local Baltimore stations. *Id.* At the same time, as the Commission carefully explained in its Order on Reconsideration, the Rules do *not* permit a carrier to engage in nakedly discriminatory treatment by isolating some, but not all, local stations on a remote satellite requiring additional equipment. *Id.* at 3-4 (quoting Orders). A declaratory ruling is an appropriate -- and speedy -- way to accomplish this vital clarification.

2. Waiver process for unavoidable technical problems. In a press release issued shortly after NAB and ALTV filed their Petition, EchoStar stated that "[i]f the FCC were to accede to the NAB's latest tactics to modify existing rules, limited bandwidth would force EchoStar to entirely terminate local channels in a number of markets it currently serves." EchoStar Statement on NAB Petition, www.dishnetwork.com (Jan. 7, 2002). That is a mischaracterization of NAB's and ALTV's position. As explained in the Emergency Petition, if EchoStar is unable -- having made every possible effort to launch a new satellite in a timely manner, and based on circumstances entirely beyond its control -- to deliver all local channels in each of its existing local-to-local markets from the same orbital locations, it should seek a very limited and temporary waiver of the Commission's rules until the satellite is operational. *See* Emergency Petition at 14 n.15. (Indeed, that is what EchoStar told analysts in July 2001 it would do if it failed to successfully launch its spot-beam satellites.) But EchoStar should *not* be granted a waiver if -- as it sometimes suggests -- it is instead *shelving* or *postponing* plans to use its own spot-beam satellites to offer local-to-local service, on the grounds that it can rely instead on the two-dish scheme as a permanent "solution" (if the merger is disapproved) or on DirecTV's spot-beam satellites (if the merger should somehow be approved).

3. **EchoStar's continuing refusal to publicize its "free" offer.** As of the date in early January when NAB and ALTV filed their Petition, EchoStar had not yet breathed a word on its Web site about its supposed "free offer" to install second dishes. Remarkably, as of January 22, 2002, EchoStar is continuing to treat this supposed "free offer" as a carefully-kept secret: EchoStar's web site contains *no mention* of this ostensible free offer.

EchoStar's long-promised letter to subscribers -- a copy of which is now on file as an attachment to the Joint Comments of Hardy, Carey and Chauter *et al.* -- confirms EchoStar's brazen hide-the-ball strategy. The letter contains three headings: (1) **"America's Top Programming and Media Services,"** (2) **"New Local Channels at No Extra Charge,"** and (3) **"FREE Pay-Per-View Coupon."** The supposed free-dish offer is not mentioned in any of these headlines -- or, for that matter, anywhere in the text of the letter. The *only* way a subscriber could become aware of the "offer" is by carefully studying a *footnote* that says "Channels vary by market. Some channels may require the installation of additional hardware; installation available at no cost until 3/31/02."

A company that actually sought to make its customers aware of a "free" offer would obviously not bury it in obscure language in a footnote. (Indeed, EchoStar's own letter illustrates the point, since the "free" offer it *does* want consumers to know about is highlighted with its own heading in the text: **"FREE Pay-Per-View Coupon."**) And EchoStar is so eager *not* to install second dishes that in addition to burying its "offer" in a hard-to-grasp footnote, it plans to turn away anyone who does not ask for the second dish within three months ("until 3/31/02"). In other words, EchoStar evidently hopes to keep its "free" offer quiet for as long as possible, and then end the "offer" before any significant number of viewers have heard about it.

EchoStar's two-dish scheme would amount to unlawful discrimination even if the carrier were vigorously and in good faith carrying out its supposed "free" offer. In fact, however, EchoStar has decided -- even with the eyes of the Commission and the public directly on its behavior -- to demonstrate by its actions that the "free" offer is a sham.

EchoStar's conduct illustrates one of the reasons that a two-dish scheme could never achieve the objectives of the SHVIA: a satellite carrier will inevitably drag its heels about carrying out a "plan" (giving away second dishes that generate no additional revenues) that is contrary to its own economic interests. In any event, even if subscribers did not have to pay the out-of-pocket costs of acquiring a second dish, the hassles and inconvenience of acquiring (and owning) a second dish would deter most customers from obtaining access to a subset of the local stations by that means. *See* NAB/ALTV Petition at 1-15.

4. The urgent need for interim relief concerning implementation of the so-called "free" offer. Although any two-dish scheme will necessarily discriminate against stations isolated on a remote satellite, the Commission should make clear that, during any brief period in which a carrier might rely on that approach (*e.g.*, after obtaining a short-term waiver based on circumstances entirely beyond its control), an offer to provide and install additional equipment for free must be real, and not a sham. In their Petition, NAB and ALTV provided reports from stations and from subscribers pointing out that the implementation of EchoStar's two dish "plan" was in shambles, *id.* at 10-11. Those few customers who, inadvertently, stumbled across, and actually became aware of, the alleged "free dish" offer and sought to obtain a second dish were met with an interminable set of hassles, hurdles, non-information, misinformation, delays, and obfuscation. *Id.* Many other subscribers have had similar experiences, as documented in the Comments of Pappas Television Companies (at 4) and the Joint Comments of Hardy, Carey and

Chauter *et al.* (at 13-14). We understand that still further "horror stories" will be supplied by other commenters in this proceeding.

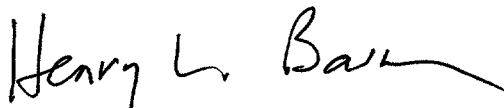
Accordingly, NAB and ALTV urgently renew their request that, as part of the FCC's interim relief, it require EchoStar to (1) *prominently and repeatedly* communicate both to existing customers and to new customers via the carrier's website and otherwise the offer of a free second dish; (2) include in any such offer *all* out-of-pocket costs of purchasing, installing, and hooking up the second dish and any other necessary equipment; (3) ensure prompt, hassle-free installation; and (4) eliminate any preconditions for the offer. *See* Petition at 12. In addition, the Commission should make clear that there can be no time (whether three months, as EchoStar has announced, or otherwise) limit on such an offer.

Conclusion


For the foregoing reasons, and the reasons set forth in NAB's and ALTV's January 4, 2002 Petition, the Commission should confirm that, to comply with the carry-one-carry-all provisions of the SHVIA, a satellite carrier may not relegate some (but not all) local stations to a satellite that requires subscribers to acquire additional equipment.

Respectfully submitted,

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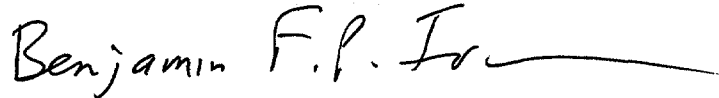
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January 23, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2002, I caused a copy of the foregoing
Comments of National Association of Broadcasters and Association of Local Television Station
to be served by U.S. Mail on the following:

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